GSA

GSA Office of Governmentwide Policy

APR 4 2003

MEMORANDUM FOR RONALD POUSSARD
DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RODNEY P. LANTIER, DIRECTOR
REGULATORY AND FEDERAL ASSISTANCE
PUBLICATIONS DIVISION

SUBJECT: FAR Case 2000-305, Commercially Available Off-the-Shelf Items

Response Number	Date Received	Comment Date	Commenter
2000-305-1	03/25/03	03/25/03	FSS/Lisa D. Maguire
2000-305-2	03/31/03	03/31/03	Department of Veterans AffairsDon Kaliher
2000-305-3	03/31/03	03/31/03	ITAA
2000-305-4	03/31/03	03/31/03	ITI
2000-305-5	03/31/03	03/31/03	DOL
2000-305-6	03/31/03	03/31/03	GSA/OIG
2000-305-7	03/31/03	03/31/03	ABA

Attachments

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

2000-305-1

Lisa D. Maguire

03/25/2003 08:45 AM

To: farcase.2000-305@gsa.gov
cc: Lisa D. Maguire/FCO/CO/GSA/GOV@GSA, Brenda L. Pollock/FCO/CO/GSA/GOV@GSA, Bonnie C. Larrabee/FCO/CO/GSA/GOV@GSA
Subject: FAR Case 2000-305

Attn: Laurie Duarte

Please find attached the GSA FSS Acquisition Management Center's comments regarding the cited FAR case. Thank you for the opportunity to comment.

farcase2000-305.doc

Lisa D. Maguire
Division Director
Commercial Acquisition Policy Division (FCOC)
FSS Acquisition Management Center
703-308-1419

2000-305-1

Proposed Rule-Federal Acquisition Regulation; Commercially Available Off-the-Shelf Items, FAR Case 2000-305

The Federal Supply Service provides the following comments/areas of concern regarding the implementation of Section 4203 of the Federal Acquisition Reform Act (the ACT) with respect to Commercially Available Off-the-Shelf Item Acquisitions.

One area of concern centers on the proposal to allow agencies to modify paragraph (i) of clause 52.212-4 to require payment upon notice of shipping. Requiring payment upon notice of shipping implies that the Government has relinquished its right to inspect/accept at the time of delivery and simply increases risk to Government agencies. In situations where defective goods are received, the contractor will already have been paid leaving little motivation to provide timely corrective action. There is also concern that "notice" is not defined. There are no inherent safeguards to prevent a contractor from merely asserting that shipment was made, thereby making payment due. If the notice is written and is a certificate of conformance, there is less risk to the Government than if the notice is a simple statement. We strongly recommend that this proposal not be adopted. Alternatively, we propose that the language be changed to leave it within the contracting officer's discretion to make payment upon notification of shipment.

Another observation regarding the FAR Case is that there is no definition for commercially available off-the-shelf (COTS) items in the FAR currently. While this office is not opposed to streamlining, it appears that if this definition is implemented, it may cause additional confusion because there will then be a set of statutes applicable to "commercial items" and another set of statutes applicable to "COTS items."

Finally, the FAR Case indicates that the Buy American Act is being removed for COTS items, but the requirement for certification is being retained. This raises several questions. Have you considered the impact to small businesses? Do you intend to give preference to domestic end products in another way? Or perhaps, clause 52.225-2 entitled "Buy American Act – Balance of Payments Program Certificate" should also be removed?

2000-305-2

"Kaliher, Donald"
<donald.kaliher@mail.va.gov>

03/31/2003 01:06 PM

To: "'farcase.2000-305@gsa.gov'" <farcase.2000-305@gsa.gov>
cc: "Latvanas, Barbara" <barbara.latvanas@mail.va.gov>
Subject: Comments of VA

To Whom It May Concern:

Attached are comments of the Department of Veterans Affairs on FAR Case 2000-305, RIN 2900-AJ55, an Advance Notice of Proposed Rulemaking titled "Federal Acquisition Regulation; Commercially Available Off-the-Shelf Items," published in the Federal Register on Thursday, January 30, 2003. These comments have also been submitted via mail.

Please direct any questions to Don Kaliher, Acquisition Policy Division, Department of Veterans Affairs, at (202) 273-8819.

Thank you.

Don Kaliher

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2000-305-2

Department of Veterans Affairs
Deputy Assistant Secretary for Acquisition and Materiel Management
Washington, DC 20420

March 31, 2003

General Services Administration
FAR Secretariat (MVA)
1800 F Street NW
Room 4035, Attn: Laurie Duarte
Washington, DC 20405

Dear FAR Secretariat:

This is in response to RIN 9000-AJ55, Advance notice of proposed rulemaking (ANPR), Federal Acquisition Regulation: Commercially Available Off-the-Shelf Items, published in the Federal Register on January 10, 2003. The Department of Veterans Affairs opposes a number of the provisions contained in this ANPR and would object to their being implemented. The provisions are listed below in the order shown in the ANPR.

The ANPR states in the SUMMARY that the list of statutes that could be determined inapplicable to commercially available off-the-shelf items (CAOTS) "cannot include a provision of law that provides for criminal or civil penalties." Yet this ANPR proposes to add the Privacy Act (5 United States Code (U.S.C.) 552a) to the list of statutes that would be excluded. There are criminal and civil penalties for violation of the Privacy Act. It may be possible for a vendor to violate the Privacy Act through the sale of a CAOTS item such as defective software. The privacy of veterans' data is very important to VA and the Government's right to prosecute violators of the Privacy Act should not be waived, even for CAOTS items.

The ANPR proposed to remove Federal Acquisition Regulation (FAR) clause 52.222-36, Affirmative Action for Handicapped Workers, from application to CAOTS acquisitions. The vast majority of VA's acquisitions are for CAOTS items. Many of the nation's veterans are handicapped as a result of their service to their country. There is no reason why firms who sell vast quantities of CAOTS items to the Federal Government, especially to VA, should be exempt from compliance with the provisions of 29 U.S.C. 793 and this clause and from the requirement to provide affirmative action to employ and advance in employment qualified individuals with disabilities, especially veterans.

The ANPR proposed to remove FAR clause 52.222-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans, from application to CAOTS acquisitions. Again, the vast majority of goods purchased by VA are CAOTS items. By removing these provisions, almost all companies that sell to VA would no longer be obligated by contract to provide equal opportunities to veterans. With the current situation in the Gulf, removal of this clause would send the wrong message to all veterans. Veterans have sacrificed for this nation and deserve to be treated fairly in the job market.

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2.

FAR Secretariat

The ANPR proposed to remove FAR clause 52.222-37, Employment Reports on Special Disabled Veterans and Veterans of the Vietnam Era, from application to CAOTS acquisitions. This clause requires contractors to file reports on their employment of veterans (the VETS-100 Report). By eliminating this requirement from all CAOTS acquisitions, virtually every company that deals with the civilian agencies of the Federal Government would no longer be required, by contract, to file VETS-100 Reports. Congress has taken a keen interest in the VETS-100 Report, as evidenced by Section 1354 of Public Law 105-339, and whether or not contractors are required to file employment reports is a matter that should be determined by Congress rather than by administrative change to the FAR.

The ANPR proposed to remove the Buy American Act (BAA) from application to CAOTS acquisitions, including FAR clauses 52.225-1, Buy American Act–Supplies, and 52.2256-3, Buy American Act–North American Free Trade Agreement–Israeli Trade Act. This would totally eliminate the application of the BAA *from civilian* agency acquisitions. Whether or not agencies should give preference to American made products is a matter that should be determined by Congress rather than by an administrative change to the FAR. This would also have a negative impact on agencies' ability to buy from veteran-owned, service-disabled veteran-owned, woman-owned, disadvantaged, HUBZone, and other small businesses, where the BAA gives such firms an advantage. Agencies are struggling now to meet socioeconomic goals and this change would make goal attainment that much harder.

The ANPR proposed to exempt CAOTS acquisitions from the provisions of 41 U.S.C. 254d(c) and remove the Comptroller General's ability to examine the records of the contractor (see paragraph (d) of FAR clause 52.212-5). Many acquisitions of CAOTS items are conducted via negotiated procedures, some of which are conducted on a sole source basis. Although certified cost or pricing data is no longer required for commercial acquisitions, data other than certified cost or pricing data may be required and it is imperative that the Government retain its right to examine contractors' records in the event the data provided is believed to be false or defective.

The ANPR proposed to remove the Government's ability to take administration action against a contractor for violation of the Procurement Integrity Act (41 U.S.C. 423) under a CAOTS acquisition. Under this authority, agencies may cancel or rescind a contract and/or initiate suspension or debarment action against a contractor for violation of the Act. We fail to see why contractors who provide CAOTS items, which cover the vast majority of all items acquired by civilian agencies, should be any less subject to the provisions of

41 U.S.C. 423 than are contractors who provide non-commercial items. Any contractor who violates the Act should be subject to the administrative sanctions of the Act, regardless of the type of supplies it provides to the Government.

The ANPR proposed to remove the provisions of 42 U.S.C. 6962(c)(3)(A)(ii) from application to CAOTS acquisitions. This section of U.S. Code requires contractors, on contracts over $100,000, to estimate the percentage of the total material used in the performance of the contract which is recovered materials. We are concerned that this may preclude contractors from having to indicate on their products the percent of recycled materials contained therein. Information on recovered material content is necessary in order for agencies to carry out the intent of the Resources Conservation and Recovery Act and Executive Order 13101.

For the above reasons, we would object to the removal of all of the above clauses and provisions of Law from application to CAOTS acquisitions. This actions proposed in this ANPR could have a negative impact on veterans and on veteran-owned and service-disabled veteran-owned small businesses. We urge reconsideration of this proposal.

Please direct any questions regarding the above comments to Mr. Don Kaliher, Acquisition Policy Division, at (202) 273-8819.

Sincerely,

/S/

David S. Derr
Acting

2000-305-3

"Olga Grkavac"
<ogrkavac@itaa.org>
03/31/2003 01:34 PM

To: farcase.2000-305@gsa.gov
cc:
Subject: ITAA's Proposed Comments

Ms. Duarte:
Here are the ITAA comments on the Commercially Available Off the Shelf Items proposed rulemaking.
Please let me know if you cannot open them.
Thank you , Olga Grkavac

Olga Grkavac
Executive Vice President
Enterprise Solutions Division
Information Technology Association of America

703/284-5311
703/525-2279 fax
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1709201_1.DOC

2000-305-3

March 31, 2003

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW
Room 4035
Washington, DC 20405

Re. FAR Case 2000-305; Advance Notice of Proposed Rulemaking Regarding Implementation of Section 4203 of the Federal Acquisition Reform Act.

Dear Ms. Duarte:

The Information Technology Association of America ("ITAA") is pleased to submit these comments in response to the January 30, 2003 advance notice of proposed rulemaking (the "Notice") regarding the implementation of section 4203 of the Federal Acquisition Reform Act ("FARA"). Pursuant to FARA, the Notice sets out those laws that the Federal Acquisition Regulation ("FAR") Councils have identified as inapplicable to Government acquisitions of commercial-off-the-shelf ("COTS") items. The ITAA believes that this list of inapplicable laws is an appropriate listing, with one exception—the omission of the Trade Agreements Act. (19 U.S.C. § 2501 et. seq.) The ITAA requests that the Trade Agreements Act ("TAA") be added to the list because, for the reasons stated below, the TAA should not be applied to COTS acquisitions.

The ITAA believes that adding the TAA to the list of laws inapplicable to COTS acquisitions is required by section 4203 of FARA. FARA provides that the FAR shall include a list of provisions of law that are inapplicable to contracts for COTS items. 41 U.S.C. § 431(a)(1). Included on this list shall be "each provision of law that, as determined by the Administrator, imposes on persons who have been awarded contracts by the Federal Government for the procurement of [COTS] Government-unique policies, procedures, requirements, or restrictions for the procurement of property or services" FARA identifies two exceptions to this requirement, (i) statutes that provide for criminal or civil penalties, and (ii) statutes that specifically state that section 4203 of FARA shall not apply. Id. § 431(b).

Importantly, the TAA, including its restrictions on the Government's acquisition of non-designated country end products, clearly satisfies FARA's criterion of imposing a "Government-unique" policy or restriction. Moreover, the TAA meets none of the exceptions permitting exclusion from the list. The TAA neither provides for criminal nor civil penalties, and it does not reference section 4203 as being inapplicable. The only other possible reason for not including the TAA on the list of inapplicable laws is if the Administrator of the Office of Federal Procurement Policy determines in writing that "it would not be in the best interest of the United States" to exempt Government contracts from the TAA. Id. § 431(a)(3). To the best of our knowledge, such a determination has not been—and indeed should not be—made by the Administrator. If the Administrator has made such a determination, however, the ITAA respectfully requests a copy of that determination.

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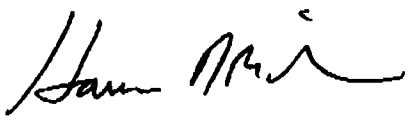
There are solid reasons for excluding COTS acquisitions from the TAA restrictions. One reason is that the TAA's restrictions place information technology and other U.S. companies at a distinct disadvantage in the worldwide commercial market. U.S. companies often must source products and components globally to remain cost competitive in the worldwide commercial market. Moreover, in some cases the sourcing decision may be mandated by manufacturing or supply constraints. As a result, the TAA occasionally causes a "catch-22" situation, where a contractor must choose between being competitive in the worldwide commercial market or being competitive in the Government market, but not both. As a practical matter, because virtually all information technology companies derive the vast majority of their revenues in the private sector, contractors typically choose to remain competitive in the commercial market and forego the potential Government sales when faced with this choice. The result being that the Government is denied access to state of the art information technologies that almost anyone else in the world can acquire.

In addition, the TAA and its related FAR certifications impose significant administrative burdens on contractors. For purposes of the TAA's so-called "substantial transformation" test, contractors must monitor closely its own manufacturing processes and those of its suppliers, and determine precisely the point in which a product may be deemed "substantially transformed." Bear in mind that this monitoring must continue even during contract performance, because contractor manufacturing and supply-chain decisions often change based on changed circumstances in the global market. Further adding to the complexity, burden, and compliance challenges posed by the TAA is the fact that many contracts require deliveries extending over the course of several years.

Finally, we note that the Buy American Act has been included on the list of inapplicable laws. The ITAA strongly supports that decision for many of the same reasons stated above. The TAA, however, is also a significant obstacle faced by the information technology industry. Therefore, we urge the FAR Councils to add the TAA to the list of inapplicable laws.

In concluding, the ITAA appreciates this opportunity to comment on the FAR Councils' advance notice of proposed rulemaking. We look forward to continuing our dialogue with the Councils on this and other issues important to Federal procurement.

Respectfully submitted,



Harris N. Miller
President
Information Technology Association of America

2000-305-4

INFORMATION TECHNOLOGY INDUSTRY COUNCIL

1250 Eye Street, NW Suite 200
Washington, DC 20005
202-737-8888 www.itic.org

March 31, 2003

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW Room 4035
Attn: Laurie Duarte
Washington, DC 20405

Ref: FAR Case 2000-305

Dear Ms. Duarte:

I am pleased to submit comments on behalf of ITI, the Information Technology Industry Council, in response to the Federal Acquisition Regulation (FAR) Council's Advanced Notice of Proposed Rulemaking (ANPR) published in the January 30, 2003 edition of the Federal Register (68 FR 4874). Specifically, the notice seeks input regarding the implementation of section 4203 of the Federal Acquisition Reform Act, which addresses the creation of a list of "provisions of law" that should be "inapplicable to contracts for the procurement of commercially available off-the-shelf items." ITI strongly supports this effort and recommends that the list of provisions be as comprehensive as possible.

In our view, the proposed list contained in the ANPR represents an excellent start in identifying government-unique provisions that impose considerable cost and administrative burdens on commercial companies, such as the Buy American Act. Such requirements, while well intentioned, create considerable disincentives for information technology (IT) manufacturers, which typically generate only 2-5 percent of their total revenues from federal sales. We are very concerned, however, about the absence of one of the most problematic government-unique provisions for IT manufacturers, namely, the Trade Agreements Act of 1979 (Public Law 96-39, 19 U.S.C. 2501 et seq., hereafter "TAA"). We strongly urge that the TAA be added to the list.

Background

The TAA requires that all products delivered to federal agencies be manufactured or "substantially transformed" in the United States, Caribbean Basin countries, NAFTA countries or countries that have signed the World Trade Organization's (WTO) Agreement on Government Procurement (GPA). Federal agencies may only purchase "non-compliant" products if no competing contractor is bidding

products from compliant or "designated" countries. The TAA's restrictions are not mandated by any treaty or international agreement, including the GPA. The U.S. is the sole GPA signatory country to enact such a law.

Congress intended the TAA to achieve two goals: 1) reward those countries who agree to open their government procurement markets to U.S. companies by providing reciprocal access to the U.S. government market; and 2) incentivize other countries to enter into similar agreements. Unfortunately, the law has not proven effective in achieving the second objective. More importantly, the TAA has created serious, unintended consequences that impede many IT vendors from bidding on government contracts and prevent federal agencies from getting the IT products they need to perform their missions most efficiently.

TAA in the Context of the WTO

It has been more than two decades since government procurement was first addressed in the Tokyo Round of the GATT. The present agreement and commitments were negotiated during the Uruguay Round and it has been seven years since the GPA came into force. Of the 145 WTO member countries, only 28 have acceded to the GPA, with the vast majority of those being original signatories. Another seven countries are in the process of negotiating accession, which generally is a multi-year process. A number of others have "observer" status, but it is uncertain whether they will ultimately move forward and complete negotiations with their fellow WTO members. Efforts to revise the provisions of the GPA in order to attract more signatories have made little progress.

The Office of the U.S. Trade Representative (USTR) has, in some cases, endeavored to negotiate bilateral or multilateral agreements with non-signatory countries that contain terms and conditions similar to those in the GPA, e.g., NAFTA, and the Caribbean Basin Initiative. Part of the strategy is to motivate these countries to take the next logical step and join the GPA. In a separate but related effort, the agency has spent the last six years as an active participant on the WTO "Working Group on Transparency in Government Procurement," which is pursuing a Transparency Agreement that would be agreed to by all members of the WTO. Despite its more narrow focus, however, this effort has stalled as well.

The IT industry has continued to raise concerns about the lack of real progress on these issues and the negative impact the TAA is having on businesses as a result. IT companies have achieved considerable success on their own in gaining access to government markets in many of the non-signatory countries, *without* the "help" of the TAA. The U.S. remains the world's leader in technology and innovation, creating tools that are essential to governments at every level. Demand has remained high around the globe, even in the face of economic uncertainties. It is ironic, indeed unfortunate, that foreign governments may have greater access to American technology than the U.S. government.

TAA's Government-Unique Requirements Create Burdens for IT Manufacturers

In order to remain competitive in the global marketplace, commercial IT and electronics manufacturers must "source" products and components from around the world. There are numerous reasons for this

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but the primary considerations are supply and cost. With product cycles as short as six months, it is critical for manufacturers to maintain uninterrupted sources of supply. Often, this means establishing multiple channels for the same components. Even when products or components are available domestically, manufacturers may still be compelled to import them in order to stay cost competitive in a market where contract awards are often based on the difference of only a few dollars per unit. For the IT industry in particular, global competition has forced manufacturers to gravitate to the low cost source, which can be non-TAA eligible countries such as China, the Philippines, and Malaysia. The TAA's sourcing restrictions do not allow sufficiently for supply and economic factors.

Another major burden is the law's certification requirements, which expose manufacturers to civil false claims and other sanctions even when they have made a good faith effort to comply with the TAA's government-unique requirements. Many contractors have had to establish and maintain costly, labor-intensive product management and tracking systems that are neither required nor necessary to manage their commercial business, while others are considering whether to avoid the government market altogether.

> Case Study: A manufacturer offers its commercial customers a wide range of communications network products, including secure and reliable Internet Protocol telephony systems. Some of its products are manufactured in more than one location, including both designated and non-designated countries. There is no compelling commercial reason for the company to track the precise manufacturing location of each individual unit sold. To assure compliance with the TAA's government-unique requirements, however, this manufacturer is forced to maintain an expensive, resource-intensive program to keep track of the origin of products that are purchased by the government.

Even when a contractor certifies that all commercial items being delivered are compliant end products, it must continue to monitor that contract at considerable expense for its *entire* duration to assure that any manufacturing source changes do not invalidate the certification made at the time of contract award.

Given the fact that commercial sales of off-the-shelf technology far outstrip federal purchases, government-unique requirements such as those imposed by the TAA rarely drive manufacturing decisions. Nevertheless, some companies will occasionally make exceptions and maintain a limited degree of manufacturing in a designated country solely to meet the government demand. This is highly unusual, however, because in most cases the additional cost cannot be passed on to the government due to the government's insistence on paying no more for COTS than a manufacturer's published commercial price.

> Case Study: A major manufacturer of test and measurement equipment has established a second final assembly point in Singapore, a designated country, solely to support the TAA requirement for products whose primary manufacturing has been transferred to Malaysia over the past two years. Currently, there are 200 products affected by this transfer ranging from power supplies to digital oscilloscopes. During the last fiscal year, the company ran

approximately 9,000 units through this process for the U.S. government. The cost premium is approximately 10% when the entire supply chain is taken into consideration.

The cost of lost sales to commercial IT manufacturers, combined with compliance and administration costs, have been estimated at well over $100 million per year, while providing *no* net benefit to the federal government.

TAA Reduces Competition for Government Contracts

By imposing TAA-related restrictions on agency IT procurements, the government may be restricting its own access to the most productive, cost-effective technologies available in the marketplace. More and more, the financial and administrative burdens and the potential liability that overshadows any government certification requirement are forcing vendors to consider whether to withhold or withdraw certain products from the federal marketplace. Others simply cannot afford to create and maintain the tracking systems, leaving them no recourse but to forego bidding on federal contracts. In either case, competition and choice are diminished.

Case Study: Senior-level DoD officials have shown keen interest in certain prototypes of products being developed by a commercial manufacturer that the Pentagon is hoping will be commercialized, to enable the agency to acquire them at market prices. If the company cannot manufacture in a non-designated country, however, it could impact its decision about whether to commercialize these products for the DoD.

Case Study: A major electronics company sells security-related video equipment to a number of government agencies, including the Department of State, for use in embassies all over the world. However, TAA restrictions forced the company to announce that its most popular cameras and monitors used for security purposes are no longer available on the GSA schedule because they now are manufactured in China and the Philippines, both non-designated countries. Even when housed with components from signatory countries, the cameras and monitors still are not eligible because it is questionable whether they have been substantially changed into a new item that complies with the TAA requirements.

Case Study: A government contractor offers a wide range of wireless telephony products to its commercial customers. However, because these products are not manufactured within the U.S. or a TAA designated country, the company does not offer these products on its GSA Schedule contract or through other contract vehicles that contain TAA restrictions. As a consequence, in order to buy this equipment, agencies are usually required to conduct an open-market procurement, which takes longer and affords less of a discount than negotiated contract vehicles. If the agency's procurement is restricted to a specific contract vehicle, however, it may not be able to acquire the products at all.

Case Study: A major electronics manufacturer is migrating the majority of its chemical analysis test equipment manufacturing to China. These products are used throughout the U.S. government for chemical testing, with applications in DoD chemical warfare development

2000-305-4

and storage facilities, environmental testing, food and drug laboratories and increasingly for Homeland Security, to identify biological and chemical terrorist threats. In order to meet the TAA requirements, the equipment modules are being shipped at considerable expense to an U.S. service center for final assembly. The additional expense, however, is becoming cost prohibitive, and may force the manufacturer to withdraw them from its General Services Administration Multiple Award Schedule contract, which is the primary means available to federal agencies for acquiring such products.

While some may argue that federal agencies can simply apply for a TAA waiver to avoid these obstacles, the exceptions found at FAR 25.401 do not cover the vast majority of federal procurements of commercial items. Moreover, contractors are extremely reluctant to seek – and contracting officers to even consider – waivers, which delay the procurement process and call attention to the potentially non-standard purchases, especially since federal agencies routinely deny such requests.

Summary

These are but a few examples of the serious consequences created by the Trade Agreements Act. Congress never intended this law to impose such burdens on commercial manufacturers – or on federal agencies. In light of the IT industry's considerable success in gaining access to foreign government markets without the TAA, we respectfully submit that the restrictive sourcing provisions of the law are no longer necessary nor useful, and have become detrimental to achieving the stated objectives of the law. For these and other reasons, ITI urges the FAR Council to add the Trade Agreements Act to the final list of laws that are inapplicable to federal contracts for the procurement of commercially available off-the-shelf items.

Thank you for this opportunity to submit comments on this critical matter. We would welcome the opportunity to meet with the Council to provide greater detail regarding our views.

Sincerely,

Rhett B. Dawson
President & CEO

2000-305-5

U.S. Department of Labor

Assistant Secretary for Policy
Washington, D.C. 20210

March 31, 2003

General Service Administration
FAR Secretariat (MVA)
1800 F Street, NW.
Room 4035
Attn: Laurie Duarte
Washington, DC 20405

The Department of Labor has reviewed the advance notice of proposed rulemaking (ANPRM) that would amend the Federal Acquisition Regulation (FAR) to implement Section 4203 of the Federal Acquisition Reform Act of 1996, Pub. L. No. 104-106 (FARA). Section 4203 requires the FAR to list certain provisions of law that are inapplicable to contracts for the acquisition of commercially available off-the-shelf items. The ANPRM invites the public to comment on whether to waive for these commercial acquisitions, among others, two statutes pertaining to equal employment opportunity for qualified individuals with disabilities, disabled veterans, campaign veterans, Armed Forces service medal veterans, and recently separated veterans. These statutes are Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793 (Section 503) and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (VEVRAA), which are administered by this Department.

The Department of Labor opposes waiving Section 503 and VEVRAA for such commercial procurements. Section 503 and VEVRAA provide employment protections for qualified individuals with disabilities and veterans who work for, or seek to work for, Federal contractors and subcontractors. Waiver of the laws would reduce protections afforded qualified individuals with disabilities and our veterans under these laws. In 1996, the Department voiced opposition to the waiver of Section 503 and VEVRAA in our comments on a nearly identical draft NPRM. We continue to believe that the small contracting burden associated with these laws should not be viewed as outweighing their societal benefits.

VEVRAA establishes important employment protections for veterans during times of peace and war. VEVRAA requires covered employers to take affirmative action to employ and advance protected veterans and prohibits employment discrimination based on their status as a protected veterans. A job listing obligation under VEVRAA requires covered employers to list job openings with state employment agencies which, in turn, assist veterans in finding employment. VEVRAA is the only law providing these protections for veterans.

The Department is mindful of the need to reduce the contracting burdens imposed by Section 503 and VEVRAA. We actively look for ways to reduce contractor burden while maintaining protections provided to qualified individuals with disabilities and protected veterans. For

2000-3055

example, the Department of Labor agencies responsible for administering Section 503 and VEVRAA look for ways to reduce the paperwork burden imposed by the laws, to streamline the evaluation process and to provide compliance assistance to contractors. We believe these programmatic efforts to reduce contractor burden overall are more effective in the long run than efforts to reduce burden for some contractors through waiver of the applicability of Section 503 and VEVRAA to contracts for off-the-shelf commercial items.

In light of the above, we believe that Section 503 and VEVRAA requirements should be retained for contracts for off-the-shelf commercial items. Therefore, in accordance with Section 4203, the Department of Labor requests that any future NPRM indicate that these equal employment opportunity laws are not proposed for waiver.

Sincerely,

Chris Spear

2000-305-6

U.S. GENERAL SERVICES ADMINISTRATION
Office of Inspector General

March 31, 2003

FAR Secretariat (MVA)
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405
Attn: Laurie Duarte

Re: Proposed FAR Case 2000-305 – Commercially Available Off-the-Shelf Items and List of Inapplicable Statutes

Dear Sir or Madam:

This letter transmits the comments of the General Services Administration, Office of Inspector General (OIG) on the above-referenced proposed FAR case. The FAR Case proposes to add additional statutes and authorities that would be made inapplicable to procurements of commercially available off-the-shelf (COTS) items. The rule implements authority provided to the Administrator of the Office of Federal Procurement Policy by Section 4203 of the Federal Acquisition Reform Act (FARA), Public Law 104-106 (1996). Our comments relate specifically to the proposal to make the Comptroller General's audit authority, embodied in 41 U.S.C. § 254(d) and 10 U.S.C. § 2513(c) as well as 48 C.F.R. § 52.215(d), inapplicable to COTS procurements. We believe it is not in the Government's interest to remove this audit authority, and so we would advocate eliminating this statutory and regulatory item from the list of inapplicable authorities.

The Comptroller General's audit authority is the last remaining general contractual audit authority applicable to commercial items contracts. In the case of GSA, for example, in 1997 the agency-specific postaward audit authority (embodied in the GSAR) was severely limited -- to checking only for overbillings and price reductions -- as to Multiple Award Schedule (MAS) program contracts. Further, the general FAR Audit-Negotiation clause was also made inapplicable to MAS and other negotiated contracts which involved commercial items by the Federal Acquisition Streamlining Act, Public Law 103-355 (1994), and the FARA. If the Comptroller General's authority to audit is also removed, the Government will have no routine audit authority (aside from more severe law enforcement tools generally utilized only when fraud indicators are present) in connection with COTS contracts. We believe this is an important authority to preserve.

Next, we note that Congress has evidenced its intent in legislative history that it intended to preserve, or at least not eliminate, the Comptroller General's audit authority when it

made changes to other audit authorities in FASA and FARA. The conference report relating to FARA (the Clinger-Cohen Act) notes, in a section-by-section analysis relating to Section 4201 ("Commercial Items exception to requirement for cost or pricing data), that "In recognition of the authority of the General Accounting Office to audit contractor records, the conferees have removed the specific audit authorities in the Federal Acquisition Streamlining Act of 1994 that relate to information supplied by commercial suppliers in lieu of certified cost and pricing data." H. Rep.104-450 (1996). We acknowledge that FARA technically requires statutory direction to eliminate a law or regulatory authority from the proposed inapplicable list. We submit, however, that this conference report statement evidences Congressional direction that the Comptroller General's authority be preserved.

Please feel free to call my counsel, Kathleen S. Tighe, on (202) 501-1932 with any questions or concerns you may have regarding these comments.

Sincerely yours,

Daniel R. Levinson

Daniel R. Levinson
Inspector General

2000-305-7

Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

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March 31, 2003

VIA HAND DELIVERY
& ELECTRONIC MAIL

General Services Administration
Regulatory Secretariat (MVA)
1800 F Street, N.W.
Room 4035
Washington, DC 20405

Attn: Ms. Laurie Duarte

RE: FAR Case 2000-305
Advance Notice of Proposed Rulemaking:
Commercially Available Off-the-Shelf Items
68 Fed. Reg. 4874 (Jan. 30, 2003)

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter.[1] The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section's governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

[1] The Honorable Mary Ellen Coster Williams, Chair of the ABA Section of Public Contract Law, has recused herself on this matter, did not participate in the Section's consideration of these comments, and abstained from voting to approve and send this letter. Similarly, Council Member Daniel I. Gordon recused himself on this matter and did not participate in either the preparation or approval of these comments.

Received 4:30pm 3/31/03

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

The Advance Notice of Proposed Rulemaking ("ANPR") published on January 30, 2003 is a follow-on to the ANPR first published in response to passage of the Federal Acquisition Reform Act of 1996 ("FARA"), Pub. L. No. 104-106. *See* 61 Fed. Reg. 22010, May 13, 1996. As we did in our comments on the 1996 ANPR, the Section generally commends the FAR Council's recommendations concerning the laws that should not be applicable to purchases of Commercial-Off-The-Shelf ("COTS") items. We have comments, however, in three areas: (1) an endorsement of the decision to include the Buy American Act within the list of laws inapplicable to acquisitions of COTs; (2) a recommendation that the Trade Agreements Act also be included on the list; and (3) an expression of concern regarding the ANPR's change in the definition of COTS. We address each of these issues below.

1. Buy American Act

The Section commends as particularly appropriate the Government's proposal to include 41 U.S.C. § 10 and the "Buy American Act – Supplies" clause (FAR 52.225-3) in the list of inapplicable laws and clauses. The purpose of section 4203 of FARA was to permit the Government to purchase COTS items under commercial marketplace terms, thereby eliminating "Government-unique requirements" that increase the cost of these items to the Government. Clearly, the Buy American Act ("BAA") is such a Government-unique requirement.

In order to ascertain that their products comply with the BAA, offerors must perform detailed analyses of the origin of each product and its components. In today's increasingly internationalized marketplace, it is becoming more difficult and expensive for manufacturers and their suppliers to know precisely where their products' components were manufactured. Contractors wishing to comply with the BAA are forced to rigorously trace the origin of their components, as well as segregate their Government inventory from commercial inventory that does not qualify under the BAA, thereby adding unnecessary expense for COTS items sold to the Government.

In sum, exempting COTS purchases from the BAA will almost assuredly reduce inefficiencies in Government procurement as well as the price of items sold to the Government, while increasing the variety of available supplies. Accordingly, we strongly endorse the exemption.

2. Trade Agreements Act

The Section recommends that, in addition to the other identified laws, COTS purchases also should be exempt from the Trade Agreements Act, Pub. L. No. 96-39 ("TAA"), and its implementing FAR clauses, 52.225-5 and 52.225-6. These clauses require offerors to certify that each end product is a "U.S.-made, designated country, Caribbean Basin country, or NAFTA country end product," as those terms are specifically defined in the clauses.

In order to execute certifications under the TAA clauses, offerors often perform a component analysis of their COTS items to determine whether the products qualify as "U.S.-made end products." In addition, in connection with this determination, offerors frequently must undertake the onerous process of determining whether their products have been "substantially transformed" in one of the countries covered by the TAA. Thus, compliance with the TAA provision can be even more burdensome than compliance with the BAA for manufacturers. Because the TAA, like the BAA, has no counterpart in the commercial marketplace, it drives up the cost of all covered goods. In fact, because relatively few COTS items purchased by the Government are covered by the BAA alone, and most such items in procurements over the current threshold of $169,000 are covered by the TAA, most suppliers of COTS items routinely perform their foreign content analyses under the TAA and not only the BAA.

The Section understands that the FAR Council may have been concerned that the United States might be in violation of its international trade agreements if COTS procurements were exempted from TAA coverage. The Section knows of no basis for such concern. The principal purpose of the TAA, and the international Agreement on Government Procurement that it implemented, was "to discourage discrimination against foreign suppliers," by permitting the President to waive provisions of the BAA that discriminated against foreign purchases by use of price preferences for domestic items. *See* S. Rep. No. 96-249, 96th Cong., 1st Sess. 129 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 515. If the BAA itself, with its price preferences, does not apply to a particular class of procurements, the TAA provisions no longer are needed to discourage discrimination against foreign suppliers.

Although the TAA also prohibits the procurement of goods in TAA-covered procurements from nondesignated countries that are not signatories to any trade agreement with the United States, this prohibition is not required by the Agreement on Government Procurement or any other international agreement. Moreover, this prohibition, which appears in section 302 of the TAA (19 U.S.C. § 2512(a)), is applicable only to procurements in which a waiver of the BAA, under section 301 of the TAA (19 U.S.C. §2511(a)), takes effect. If the BAA does not apply to procurements, there will be no waiver under Section 301 of the TAA, and the prohibition under section 302 of the TAA would not come into play.

Thus, the inclusion of a TAA exemption for COTS procurements would have the same salutary effect on efficiency and cost-effectiveness in Government procurement as would the currently proposed BAA exemption, without violating any international trade agreement or statute.

3. Definition of COTS

Finally, the Section is concerned with the change in the definition of COTS in the current ANPR. The provisions of FARA that created the statutory waiver authority for COTS defined COTS as an item that: (a) is a commercial item (as defined in 41 U.S.C. § 403(12)(A)); (b) is sold in substantial quantities in the commercial marketplace; and (c) is offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace. *See* 41 U.S.C. § 431(c). The 1996 ANPR tracked this statutory definition of COTS. Nevertheless, the current ANPR inappropriately replaces the reference to the definition of commercial item with the undefined and vague phrase: "is of a type customarily used by the general public for nongovernmental purposes." The Section recommends that the definition of COTS in the current ANPR be revised to track the statutory definition of COTS.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Hubert J. Bell, Jr.
Chair-Elect, Section of Public Contract Law

2000-305-7

cc: Mary Ellen Coster Williams
Patricia H. Wittie
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Council Members
Co-Chairs and Vice Chairs of the
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Richard P. Rector